

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)
In the Matter of Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III)	Docket No. 17-CRB-0001-BER (2019-2023)

**MUSIC CHOICE’S RESPONSE IN OPPOSITION TO SOUNDEXCHANGE’S MOTION
TO REOPEN BUSINESS ESTABLISHMENT SERVICE RATE PROCEEDINGS**

Pursuant to 37 C.F.R. §§ 303.4 and 303.6(f), Music Choice respectfully submits this Response in Opposition to SoundExchange’s February 9, 2022 Motion to Reopen Business Establishment Service Rate Proceedings for the Limited Purpose of Interpreting Regulations on Referral from the U.S. District Court for the District of Columbia (the “Motion”).

In its Motion, SoundExchange asks the Judges to reopen multiple ratemaking proceedings collectively spanning back over more than a decade, order document discovery, and allow for depositions and interrogatories, all so that the Judges can issue an advisory opinion on a narrow question of statutory interpretation. What SoundExchange asks of the Judges is wholly inappropriate and unsupported by any legal precedent.

As SoundExchange tacitly acknowledges, the merits of the underlying dispute which gives rise to this referral are not properly before the Judges—they are solely within the purview of the federal district court where SoundExchange elected to bring the underlying case. That district court stayed the underlying action, including discovery, to allow SoundExchange to seek guidance from the Judges exclusively on a very narrow legal issue: the interpretation of the definition of “Gross Proceeds” in the regulations applicable to the Business Establishment Services statutory license. *See* Mem. Op., *SoundExchange, Inc. v. Music Choice*, No. CV 19-999 (RBW), 2021 WL 5998382, at *3 (D.D.C. Dec. 20, 2021).

To offer the requested guidance, the Judges, at most, need to re-open a single BES proceeding and afford the parties the opportunity to be heard on the very narrow legal question that has been put before them. There is no need to re-open more than one such proceeding for the Judges to provide the requested guidance. And it makes no sense to allow fact discovery. Not only is fact-finding and the application of the relevant regulation to the facts not called for by the referral from the district court, but allowing for such fact-finding and application would usurp the role of the district court. Moreover, SoundExchange points to no case law in support of its claim that discovery is warranted here. To the contrary, the only case law cited by SoundExchange says exactly the opposite—that discovery under such circumstances is entirely inappropriate.

SoundExchange’s request for the Judges to undertake far more than the narrow interpretive task before them should be rejected. To the extent the Judges must reopen a proceeding to offer the guidance sought by the district court, such reopening should be limited to a single BES proceeding, and the Judges should limit the scope of that reopening to the simultaneous exchange of briefing on the narrow question of law referred.

PROCEDURAL HISTORY

Music Choice provides various music subscription offerings to businesses and individual subscribers. The offering at issue here is Music Choice's Business Establishment Service ("BES"). The Judges have never yet had the opportunity to substantively address the BES license, because the rates and terms have been set by private settlement agreement in every rate period since the Copyright Royalty Board was established. The BES license is unique among the various other sound recording licenses administered by the Judges because unlike every other type of statutory sound recording licensee class, Congress entirely exempted BES from any sound recording performance right. 17 U.S.C. § 114(d)(1)(C)(iv). Put another way, Congress determined that due to the nature of BES, they are free to publicly perform sound recordings by transmitting them to business establishments for use in the ordinary course of their businesses without paying any royalty at all for such performances.

Under some, but not all, circumstances, a BES may be required to obtain a license to create "ephemeral" copies of sound recordings to the extent necessary to render the exempted performances. Under Section 112, an entity engaging in lawful digital performances of sound recordings can make at least one ephemeral copy to facilitate transmissions of those recordings without any license or royalty payment obligation at all. 17 U.S.C. § 112(a)(1). Thus, if a BES chooses to transmit its service in a manner that only requires one (or less) copy of a sound recording for such transmission, that BES does not need to pay any royalties to SoundExchange at all. Indeed, Music Choice understands that there are a number of BES providers who do not pay royalties to SoundExchange for their services, or pay for only a small portion of their services. In instances where a BES makes more than one such copy, the entity arguably needs to secure a license and, if called for by the license, pay royalties. To secure such a license, the

provider of a service that meets certain requirements (as Music Choice’s BES offering does) may avail itself of the statutory license provided in Section 112(e) of the Copyright Act. Music Choice has done just that and, pursuant to the terms of the BES statutory license, has paid statutory royalties to SoundExchange.

The regulations applicable to this BES statutory license were drafted and originally implemented by a different and now-defunct agency, the Copyright Arbitration Royalty Panels (“CARP”), twenty years ago. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45,240 (July 8, 2002). That proceeding resulted in the first codified regulations for the Business Establishment Service license, which contained the same language at issue in this case. *See id.* at 25,263; *see also, id.* at 45,268 (“‘Gross proceeds’ shall mean all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv).”). Since then, every subsequent BES proceeding has settled—and no party has ever objected to the settlement. Each such settlement has carried over the same regulatory definition of “Gross Proceeds” as enacted by the CARP two decades ago.¹

¹ While SoundExchange suggests that the language has changed over time, that is not accurate. Mot. at 3-4. The language “all fees and payments, including those made in kind, received from any source before, during or after the License term which are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public a performance of a sound recording under the limitation on the exclusive rights specified in section 114(d)(1)(c)(iv)” within the statutory definition of “Gross Proceeds” remained unchanged from the BES Regulations’ inception through the date of SoundExchange’s Complaint. Compare 37 C.F.R. 361 (Effective to Jul. 8, 2002) with 37 C.F.R. § 384.3(a) (Effective Jan. 1, 2009) with 37 C.F.R. § 384.3(a) (Effective Jan. 1, 2014) and 37 C.F.R. § 384.3(a)(2) (Effective Jan. 1, 2019) and 37 C.F.R. § 384.3(a)(2) (Effective Jul. 8, 2019). It is only the language of surrounding regulatory terms that changed, albeit in non-substantive ways. And the only change to the definition of Gross Proceeds since the date of the Complaint was the

On April 10, 2019, SoundExchange filed a Complaint in the United States Federal Court for the District of Columbia in *SoundExchange, Inc. v. Music Choice*, No. CV 19-999 (RBW), ECF No. 1 (Apr. 10, 2019), purporting to state causes of action under the Copyright Act for the underpayment of royalties due pursuant to the Section 112 statutory license for Business Establishment Services. Nowhere did the Complaint seek any modification of the rates or terms applicable to that license (nor could it, as such ratemaking proceedings occur on a statutorily specified schedule). *See* 17 U.S.C. §112(e)(3)). Rather, SoundExchange alleged a private claim for damages based on the application of the rates and terms, as they exist today. *See* Complaint, *SoundExchange, Inc. v. Music Choice*, No. CV 19-999 (RBW), ECF No. 1 ¶¶ 24-29. Those claims purportedly arose from the findings of an audit SoundExchange conducted starting in 2017. *See id.* ECF No. 8 ¶ 7 (Jun. 24, 2019).

To summarize, the litigation between SoundExchange and Music Choice boils down to a private commercial dispute over the amount owed for the ephemeral copies Music Choice has made pursuant to the BES statutory license. As previously noted, under Section 112, an entity engaging in lawful digital performances of sound recordings can make one ephemeral copy to facilitate transmissions of those recordings without any license or royalty payment obligation and it is only in instances where a transmitting entity makes more than one ephemeral copy of a recording is there arguably any licensing requirement. The regulations governing the statutory license contain a royalty formula based upon a percentage of the service's Gross Proceeds, which is defined as the revenue "derived from the use of sound recordings . . . pursuant to 17 U.S.C.

addition of language noting that the definition applied to recordings "subject to protection under title 17, United States Code." *Compare* 37 C.F.R. § 384.3(a)(2) (Effective as of Jul. 8, 2019) with 37 C.F.R. § 384.3(a)(2) (Effective Jan. 1, 2019).

112(e) for the *sole purpose* of facilitating” a BES performance. 37 C.F.R. §384.3(a)(2). (emphasis added).

In its Answer to SoundExchange’s Complaint, Music Choice acknowledged that it has used the Section 112(e) statutory license in connection with its BES and has remitted statutory payments for its BES to SoundExchange. Music Choice also acknowledged that for certain subscribers, Music Choice must make more than one additional ephemeral copy to facilitate those transmissions. But for other subscribers, Music Choice is able to render its BES transmissions without making any additional copies. And Music Choice’s position is that to the extent server copies have already been made for the purpose of facilitating other licensed transmissions, such copies are not made for the *sole purpose* of facilitating a performance by its BES (or that all such ephemeral copies require a license at all). *See SoundExchange, Inc. v. Music Choice*, No. CV 19-999 (RBW), ECF No. 8 ¶ 23 (Jun. 24, 2019), attached hereto as **Exhibit A**.

To the extent no additional copies are required in order to transmit Music Choice’s BES to a given subscriber – and given that Congress has already determined that BES need not pay anything for the value of the performances of the sound recordings – Music Choice does not, and should not have to pay any royalties to SoundExchange. It should be in the same position – with respect to that subset of transmissions – as a BES that is able to transmit its service without making any ephemeral copies at all. The BES regulations have always recognized this principal by only requiring royalties to be calculated based upon revenues derived from ephemeral copies made “for the sole purpose” of facilitating BES performances, and it is those ephemeral copies for which Music Choice has properly remitted royalty payments to SoundExchange pursuant to the governing regulations. SoundExchange, for its part, disagrees and asserts that Music Choice

must pay royalties based upon all revenue from its BES service, irrespective of whether the revenue was derived from the use of copies made “for the sole purpose” of facilitating BES performances or not. In doing so, not only does SoundExchange ignore the plain text of the Gross Proceeds definition, it in essence seeks to capture the value of all BES performances even though Congress expressly exempted BES from having to pay for those performances.

On April 8, 2020, in a Rule 16 report regarding the case schedule, SoundExchange for the first time raised the possibility that the regulatory interpretation of the “Gross Proceeds” definition might be appropriately referred to the Copyright Royalty Board under the doctrine of primary jurisdiction. *SoundExchange, Inc. v. Music Choice*, No. CV 19-999 (RBW), ECF No. 20 at 14-15 (Apr. 8, 2020).

At the district court’s request, on July 7, 2020 the parties submitted briefing on the issue of whether such a referral was appropriate. Those briefs remained pending for nearly eighteen months. On December 20, 2021, the district court issued a Memorandum Opinion, staying that case—including discovery—pending an advisory opinion from the Board on a narrow question of statutory interpretation.

On February 9, 2022, nearly two months later, SoundExchange moved to reopen not only the most recent rate-setting proceeding for the BES license, but two prior proceedings as well. *See* Mot. at 1.

ARGUMENT

A. There is No Reason to Reopen More than One BES Proceeding

In offering its interpretive guidance on the referred question, there is no reason for the Judges to open more than one proceeding, as the regulatory language at issue has stayed exactly the same in the codified versions of 37 C.F.R. 384.3 since 2009. As the Judges’ role in this

context is limited to interpreting the regulation in question, and because that regulatory language did not change from proceeding to proceeding, the reopening of multiple proceedings is unnecessary and inefficient. It serves no purpose other than to add complexity and administrative headache to what should be a very narrow issue.

But even if there were some reason to re-open multiple BES proceedings, and SoundExchange has not provided one (beyond the above-discussed incorrect suggestion that the relevant language has changed over time), there is no reason to reopen *all three* BES proceedings as SoundExchange requests. At most, the Judges should reopen only those proceedings that cover the period at issue in the underlying proceeding. SoundExchange filed its Complaint in federal court in 2019, alleging causes of action only under the Copyright Act. Under the three-year statute of limitations applicable to claims brought under the Copyright Act, SoundExchange is not entitled to any relief for alleged underpayments occurring before 2016. *See* 17 U.S.C. § 507(b). SoundExchange’s claims could, at most, cover portions of the 2014–2018 rate period and the 2019–2023 rate period. There is no reason to open any proceedings related to earlier rate periods.

B. Any Reopening Must be Strictly Limited to the Requested Legal Interpretation of the Relevant Regulation

To the extent the Judges do reopen any BES proceedings to provide guidance regarding the pending question of regulatory interpretation, interpretation is where the exercise must end because that is where the Judges’ jurisdiction ends. The Judges have previously recognized this very limitation, explicitly rejecting the proposition that their “continuing jurisdiction to interpret, or their ability to provide ‘interpretive guidance,’ somehow endows them with jurisdiction to resolve factual disputes relating to application of those regulations.” *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed.

Reg. 56,725, 56,727 (Nov. 30, 2017). As a result, any reopening of past BES proceedings can be done only to address the limited legal question referred—not to weigh any factual dispute or apply the interpretation of the regulation at issue to the facts. SoundExchange cites no authority that undermines the Judges’ prior ruling on this point in any way. Indeed, the only authority SoundExchange cites is the case just discussed—one that explicitly forecloses any consideration of the facts.

Despite offering no legal basis for doing so, SoundExchange nevertheless asks the Judges to go far beyond mere regulatory interpretation, and requests discovery and fact-finding, under the misguided theory that “it is necessary for SoundExchange and the Judges to understand what Music Choice has been doing to interpret the regulations productively.” Mot. at 8. In its Proposed Order, SoundExchange goes even further, asking to “develop an evidentiary record concerning Music Choice’s actual BES payment allocation practices” and seeking, in addition to document discovery, interrogatories and depositions. Mot. at 7-8. This is wholly inappropriate and directly at odds with governing precedent. First, discovery into what Music Choice has been doing would not help address the issue of regulatory interpretation before the Judges. The issue before the Judges is straightforward—does the “sole purpose” language in the definition of “Gross Proceeds” intend to limit the revenues that must be included or not? Discovery would not shed any light on the answer to that purely legal question. Second, as the Board itself has acknowledged, “the Judges’ jurisdiction does not extend to application and factual dispute resolution regarding application of the regulations.” *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. 56,725, 56,727 (Nov. 30, 2017). The question of how Music Choice has been calculating “Gross Proceeds” and whether that approach complies with the regulations (with the benefit of any

guidance the Judges may provide regarding their interpretation of the “Gross Proceeds” regulatory term) is an issue exclusively for the district court.

SoundExchange should not be permitted to turn a narrow referral on a purely legal issue into a full-blown litigation before the Judges, or to use the referral to obtain pre-discovery for its pending district court litigation. Discovery in this dispute exclusively falls within the purview of the district court—the court in which SoundExchange itself chose to have this dispute adjudicated. Were the Judges to allow for such discovery here, they unquestionably would be usurping the role of the district court and upending well settled precedent—something that the referral plainly does not call for. *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 82 Fed. Reg. at 56,726 (“the District Court could not have referred to the Judges resolution of the ultimate issues of fact presented by the SoundExchange litigation. The District Court is the forum in which resolution of the factual dispute lies. That factual dispute requires full discovery. . . . Notwithstanding language or rhetoric regarding the application of the CRB regulations to the facts of the District Court matter, the narrow question referable to the Judges was one of interpretation.”). *See also Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV)*, 81 Fed. Reg. 26,316, 26,401 n.228 (May 2, 2016) (Where a payment dispute arises from an audit of payments made under the statutory license “any attempt to seek a remedy based upon an auditor’s findings, and any attempt to challenge those findings, must be made in a court of competent jurisdiction, or through any private alternative dispute resolution procedure to which the affected parties may have agreed.”)

Because the Judges’ role here is limited to statutory interpretation, and expressly excludes any evaluation of the facts and any application of those facts to the regulation in

dispute, there are no grounds to engage in discovery. The limited issue of regulatory interpretation referred to the Judges can and should be resolved through briefing alone, with oral argument if the Judges deem it appropriate after reviewing the parties' briefs.²

Dated: February 23, 2022

Respectfully submitted,

By: /s/ Paul M. Fakler

Paul Fakler (NY Bar No. 2940435)

pfakler@mayerbrown.com

Jacob B. Ebin (NY Bar No. 4774618)

jebin@mayerbrown.com

Margaret Wheeler-Frothingham

(NY Bar No. 5281191)

mwheelerfrothingham@mayerbrown.com

MAYER BROWN LLP

1221 Avenue of the Americas

New York, New York 10020-1001

Tel.: (212) 506-2441

Fax: (212) 849-5549

Counsel for Music Choice

² Music Choice's proposal for briefing is set forth in the attached Proposed Order.

Exhibit A

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

SOUNDEXCHANGE, INC.

Plaintiff,

v.

MUSIC CHOICE

328 W. 34th St.

New York, NY 10001

Defendant.

Civil Action No. 1:19-cv-999-RBW

DEFENDANT MUSIC CHOICE’S ANSWER TO COMPLAINT

Defendant Music Choice (“Music Choice” or “Defendant”), by and through its attorneys, Orrick, Herrington & Sutcliffe LLP, hereby answers and interposes affirmative and other defenses to the Complaint filed by SoundExchange, Inc. (“SoundExchange” or Plaintiff”) on April 10, 2019.

GENERAL RESPONSES

Defendant denies all allegations of the complaint filed by Plaintiff in this action (“Complaint”) that are not specifically admitted herein. The numbered paragraphs of this Answer correspond to the paragraphs as numbered in the Complaint. With respect to the headings that are used in the Complaint to group together paragraphs, Defendant repeats those headings solely for the purposes of clearly articulating its responses to the substantive allegations contained in the numbered paragraphs of the Complaint and responds generally that such headings and groupings are conclusions of law, purely argumentative, or otherwise non-factual, and Defendant accordingly denies all allegations made or implied by such headings or groupings.

To the extent paragraphs in the Complaint contain allegations that reference unidentified persons, entities, or things, Defendant responds generally that it cannot respond to allegations concerning unidentified persons, entities, or things. However, Defendant has made its best effort to respond in good faith to paragraphs in the Complaint that contain such allegations.

SPECIFIC RESPONSES

In answer to the separate numbered paragraphs of the Complaint, Defendant states:

PRELIMINARY STATEMENT

1. Music Choice admits that Plaintiff is a non-profit organization authorized to collect and distribute certain statutory royalties for the use of copyrighted sound recordings. Music Choice admits that Plaintiff purports to state claims against Music Choice for unpaid royalties, late fees, and SoundExchange's costs of verifying Music Choice's royalty payments under the statutory Business Establishment Service license but denies that such claims are valid or that Plaintiff is entitled to any relief.

2. Music Choice admits that the Copyright Act permits Music Choice and certain other music service providers to obtain statutory licenses for the use of copyrighted sound recordings without directly negotiating such licenses with the rights owners, and that the terms of some such statutory licenses under the Copyright Act require licensees to file a Notice of Use with the Copyright Office pursuant to 37 C.F.R. §370.2 in order to utilize the statutory license. Music Choice admits that licensees relying on a statutory license must comply with the requirements of that license. Music Choice denies that the Copyright Act requires statutory licensees to pay for all uses of copyrighted works.

3. Music Choice admits that, if the relevant parties cannot reach a voluntary agreement on reasonable rates and terms, the royalty rates and regulations applicable to certain

statutory licenses under the Copyright Act are generally determined by a rulemaking before the Copyright Royalty Board, which consists of three appointed Copyright Royalty Judges. Music Choice admits that the royalty rates and terms resulting from proceedings before the Copyright Royalty Board are set forth in Copyright Royalty Board regulations, and that under some statutory licenses, including the Business Establishment Service license, statutory royalties must be paid to SoundExchange.

4. Music Choice admits that it provides various different digital music services, including a residential consumer audio service and an audio service provided to business establishments, which Music Choice admits that it has described as offering “over 50 channels of CD quality music” to help businesses “create the proper ambiance.” Music Choice admits that it uses the statutory license in connection with its Business Establishment Service. Music Choice admits that SoundExchange’s Complaint pertains to Music Choice’s Business Establishment Service. Music Choice lacks knowledge or information sufficient to admit or deny the remaining allegations in paragraph 4, and on that ground denies such allegations.

5. Music Choice admits that it uses the statutory license provided for in Section 112(e) of the Copyright Act in connection with its Business Establishment Service but denies that a license is required for every use of a sound recording made by a Business Establishment Service. Music Choice admits that the statutory royalty rate and payment terms for a Business Establishment Service are set forth in 37 C.F.R. Part 384, and that the basic royalty rate for a Business Establishment Service is currently 12.5% of the licensee’s Gross Proceeds, defined as those proceeds “derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording . . .” 37 C.F.R. §384.3(a)(2).

6. Music Choice admits that the very purpose of Congress's creation of a statutory license was to limit sound recording copyright owners' rights such that they cannot prohibit the use of their sound recordings covered by the statutory license, and that statutory licensees are subject to reporting and verification of that reporting by an independent auditor pursuant to the applicable regulations for such statutory license. Music Choice denies the remaining allegations of paragraph 6.

7. Music choice admits that Prager Metis conducted a verification of Music Choice's Business Establishment Service royalty payments on SoundExchange's behalf beginning in 2017 and continuing into 2018 but denies that such verification commenced in 2016 and further denies that Prager Metis employed valid verification procedures or utilized generally accepted auditing standards in connection with its verification. Music Choice admits that SoundExchange has taken the position that the verification revealed that Music Choice underpaid statutory royalties for and allocated the fees and payments received by its Business Establishment Service in a manner not contemplated by the applicable regulations, but Music Choice denies that position is correct. Music Choice lacks knowledge or information sufficient to admit or deny the allegations regarding the timing of SoundExchange's engagement of Prager Metis, and on that ground denies such allegations. Music Choice denies all remaining allegations in paragraph 7.

JURISDICTION AND VENUE

8. Music Choice admits that SoundExchange's Complaint purports to state claims under the Copyright Act but denies that such claims are valid or that Plaintiff is entitled to any relief. Music Choice admits that subject matter jurisdiction is proper in this Court.

9. Music Choice denies that 28 U.S.C. §1391 is applicable to this case. Music Choice admits that its contacts with the District of Columbia in connection with providing its

Business Establishment Service to subscribers in this District and the payments it makes to SoundExchange are sufficient to subject Music Choice to personal jurisdiction in this Court for the limited purpose of this action. Music Choice denies the remaining allegations of paragraph 9.

10. Music Choice admits that it has filed all paperwork with the Copyright Office necessary for it to utilize the statutory Business Establishment Service license, and that it provides music services throughout the country, including in the District of Columbia, and sends or uploads statements of account and royalty payments to SoundExchange in its Washington D.C. office. Music Choice denies that it has made only partial payments of the royalties due under its Business Establishment Service license and denies all remaining allegations in paragraph 10.

PARTIES

11. Music Choice admits that SoundExchange is a nonprofit organization that is currently designated as the sole entity in the United States to collect royalties from certain, but not all, statutory licensees, including Business Establishment Service licensees. Music Choice admits that SoundExchange has standing to sue to collect allegedly unpaid royalties under such statutory licenses but denies that SoundExchange is charged with “enforcing statutory license requirements” and further denies that 17 U.S.C. §114(g)(3) authorizes this action. Music Choice lacks knowledge or information sufficient to admit or deny the remaining allegations of paragraph 11, and on that ground denies such allegations.

12. Music Choice admits that it is a Pennsylvania general partnership and that it provides various music channel subscription offerings to business and individual subscribers, including its Business Establishment Service. Music Choice denies that its principal place of business is at 650 Dresher Road, Horsham, PA 19044.

FACTUAL ALLEGATIONS

A. The Statutory Framework and Applicable CRB Regulations

13. Music Choice admits that Section 106 of the Copyright Act grants the owner of a copyright in a sound recording the exclusive right to transmit the recording publicly by means of digital audio transmission but notes that there are numerous exceptions and limitations to that right, and that no right of public performance applies to the transmissions made by a Business Establishment Service.

14. Music Choice admits the allegations of paragraph 14.

15. Music Choice admits that some music services making digital transmissions to business establishments may need to make certain reproductions of sound recordings solely to facilitate those transmissions, but denies that all services making digital transmissions to business establishments need to make reproductions of sound recordings as part of the transmission process and denies that, to the extent such reproductions are made, those reproductions always require a license. Music Choice admits that the exemption created under Section 114 of the Copyright Act does not expressly provide a means for securing a license for such reproductions. Music Choice admits that Congress created Section 112 of the Copyright Act as a safe harbor for Business Establishment Services making copies of sound recordings to facilitate public performances of those recordings but denies that Business Establishment Services are legally required to obtain a license or pay royalties for all such reproductions.

16. Music Choice admits that the Section 112(e) statutory license provides a safe harbor to a Business Establishment Service provider that makes copies of sound recordings to facilitate the public performances it transmits to business establishments under §114(d)(1)(C)(iv)

of the Copyright Act, and that the safe harbor applies only where the requirements of the Section 112(e) license are met. Music Choice admits that the Section 112 license provides a safe harbor for a Business Establishment Service making numerous copies of each sound recording, and that the current regulations allow a Business Establishment Service to make an unlimited number of copies pursuant to the license. Music Choice lacks knowledge or information sufficient to admit or deny SoundExchange's allegations as to why copies licensed under the Section 112(e) are referred to as "ephemeral," and on that ground denies such allegations. Music Choice denies that it is necessary for all Business Establishment Service providers to make multiple copies of sound recordings, or that Business Establishment Service providers must always obtain the Section 112 license in order to make multiple copies lawfully, and denies all remaining allegations contained in paragraph 16.

17. Music Choice admits that a service wishing to rely on the statutory Business Establishment Service license must pay royalties on a percentage of the Gross Proceeds "derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording" by its Business Establishment Service and must report its usage of sound recordings to SoundExchange. Music Choice admits that SoundExchange accurately states the basic statutory royalty rates for the Business Establishment Service license for the time periods specified in paragraph 17. Music Choice denies that copies made solely for the purpose of lawful performances of sound recordings have any value independent of the performance and further denies all remaining allegations contained in paragraph 17.

18. Music Choice admits the allegations of paragraph 18.

19. Music Choice admits that, at various times, SoundExchange or its predecessor RIAA have been the designated collective for the collection and distribution of certain statutory licenses but denies that those entities are or have been the designated collective for all statutory licenses.

20. Music Choice admits that the regulations applicable to the Business Establishment Service license provide a process by which SoundExchange may engage an independent auditor to verify licensees' statutory royalty payments. Music Choice admits that when a verification of a Business Establishment Service's payments reveals an undisputed underpayment of 10% or more, the Business Establishment Service is required to pay SoundExchange's reasonable costs of the verification, but denies that a Business Establishment Service must pay such costs when the allegations of underpayment are disputed or ultimately ruled to be unmeritorious. Music Choice lacks knowledge or information sufficient to admit or deny the remaining allegations of paragraph 20 and on that ground denies such allegations.

B. Music Choice's Underpayment of BES Royalties

21. Music Choice admits that it offers various different types of digital music services, including a consumer audio service that is delivered, *inter alia*, via cable and satellite television providers as part of consumers' television packages, classified as a Preexisting Subscription Service as defined in the Copyright Act.

22. Music Choice admits that its website indicates that its Business Establishment Service offers over 50 channels of uninterrupted music, and that Business Establishment Service subscribers have the ability to control which channels are played in their business establishments. Music Choice admits that it has provided, in some instances and at certain times, nearly one

hundred channels to certain of its Business Establishment Service subscribers. Music Choice denies all remaining allegations contained in paragraph 22.

23. Music Choice admits that it has used the Section 112(e) statutory license in connection with its Business Establishment Service and has remitted statutory payments for its Business Establishment Service to SoundExchange. Music Choice admits that it makes server copies of musical recordings that it performs via its various music services, and that in some instances intermediate copies may be made during certain stages of the transmission of its music channels. Music Choice denies that all such copies are made for the sole purpose of facilitating a performance by its Business Establishment Service or that all such copies require a license, and denies all remaining allegations contained in paragraph 23.

24. Music Choice admits that SoundExchange engaged Prager Metis to verify Music Choice's statutory payments for its Business Establishment Service. Music Choice admits that because SoundExchange's verification was commenced in 2017, Music Choice provided relevant financial information with respect only to the three full years lawfully covered by the verification pursuant to the applicable regulations, namely 2014, 2015, and 2016. Music Choice further admits that it did not provide information regarding its 2013 Business Establishment Service activities on the ground that such information was outside the permitted time scope of the verification. Music Choice admits that it calculated the Section 112 royalty payments for its Business Establishment Service based on the applicable regulatory definition of "Gross Proceeds" as revenue "derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. §112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording" Music Choice admits that SoundExchange took the position that the verification revealed that Music Choice underreported and underpaid

Business Establishment Service royalties and owes millions of dollars in royalties and late fees, but Music Choice denies that such position is correct. Music Choice denies that it did not fully cooperate with the verification as required by the applicable regulations and further denies that Prager Metis employed valid verification procedures or utilized generally accepted auditing standards in connection with its verification. Music Choice denies that SoundExchange is entitled to recover any costs of the verification procedure and denies all remaining allegations in paragraph 24.

25. Music Choice admits that it has historically calculated, and continues to calculate, its royalty payments for the Business Establishment Service based on the applicable regulatory definition of “Gross Proceeds” as revenue “derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. §112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording” by a Business Establishment Service. Music Choice denies all remaining allegations in paragraph 25.

26. Music Choice admits that it explained to Prager Metis that it is not required to pay Business Establishment Service royalties for the reproduction of sound recordings transmitted by the Business Establishment Service to the extent those reproductions were not made for the sole purpose of facilitating transmissions by its Business Establishment Service and explained that for the purpose of calculating Gross Proceeds as defined in the applicable regulation Music Choice included only revenue attributable to channels solely provided to Business Establishment Service subscribers. Music Choice denies that it reported or paid less than the full amount of its Business Establishment Service’s Gross Proceeds (as that term is defined in the applicable regulation) and denies all remaining allegations in paragraph 26.

27. Music Choice denies the allegations in paragraph 27.

28. Music Choice denies that the referenced allocation is the only allocation from total revenue allowable pursuant to the applicable law, and further denies all remaining allegations in paragraph 28.

29. Music Choice denies the allegations in paragraph 29.

C. Late Fees and Verification Procedure Costs

30. Music Choice denies the allegations in paragraph 30.

31. Music Choice denies the allegations in paragraph 31.

COUNT ONE

(Violation of 34 C.F.R. §§ 384.3 & .4 – Recovery of Unpaid Royalties and Late Fees)

32. Defendant incorporates by reference its responses to paragraphs 1-31 as if set forth herein.

33. Music Choice admits that Section 112(e) of the Copyright Act provides a statutory license for the making of ephemeral copies to facilitate transmissions made as part of a Business Establishment Service. Music Choice admits that, to the extent that it uses that statutory license, it must remit royalties under the rates and terms set forth in the applicable Copyright Royalty Board regulations. Music Choice denies all remaining allegations in paragraph 33.

34. Music Choice admits that its Business Establishment Service payments to SoundExchange must be calculated based on a percentage of its revenue “derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording” by its Business Establishment Service. Music Choice denies the remaining allegations contained in paragraph 34.

35. Music Choice admits that it has calculated its Business Establishment Service royalty payments based on Gross Proceeds, defined as those “derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. §112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording” by its Business Establishment Service. Music Choice denies the remaining allegations in paragraph 35 of the Complaint.

36. Music Choice denies the allegations in paragraph 36.

37. Music Choice denies the allegations in paragraph 37.

38. Music Choice denies the allegations in paragraph 38.

COUNT TWO

(Violation of 37 C.F.R. § 384.6(g) – Recovery of Unpaid Verification Fees)

39. Defendant incorporates by reference its responses to paragraphs 1-38 as if set forth herein.

40. Music Choice admits that Prager Metis purported to conduct a verification of Music Choice’s royalty payments made during the three-year statutory period prior to the commencement of that verification. Music Choice denies the remaining allegations in paragraph 40.

41. Music Choice denies the allegations in paragraph 41.

DEFENSES

Defendant has not yet completed its investigation of the facts of this case, has not completed discovery in this matter, and has not completed its preparation for trial. The defenses asserted herein are based on Defendant’s knowledge, information and belief at this time.

Defendant specifically reserves the right to modify, amend, or supplement any defense contained

herein at any time. Without conceding that it bears the burden of proof or persuasion as to any of them, Defendant alleges the following separate defenses to the Complaint:

FIRST DEFENSE

(Failure to State a Claim)

1. Plaintiff's Complaint, and each claim contained therein, fails to state a claim upon which relief may be granted.

SECOND DEFENSE

(Statute of Limitations)

2. Plaintiff's claims are barred in whole or in part by the applicable statute of limitations.

THIRD DEFENSE

(Fair Use)

3. Plaintiff's claims are barred in whole or in part by the doctrine of fair use to the extent that the alleged ephemeral copies consist of electronic copies of all or part of a digital audio recording made as a server, cache, buffer, or other intermediate copy for the purpose of facilitating or implementing the transmission of a lawful performance of that audio recording and therefore no license fees are due for such copies.

FOURTH DEFENSE

(*De Minimis* Use)

4. Plaintiff's claims are barred in whole or in part to the extent that the alleged ephemeral copies consist of electronic copies of all or part of a digital audio recording made as a server, cache, buffer, or other intermediate copy that is sufficiently small in size or duration that

such copying constitutes a *de minimis* use from which no liability should ensue and therefore no license fees are due for such copies.

FIFTH DEFENSE

(No Volitional Act)

5. Plaintiff's claims are barred in whole or in part to the extent that the alleged ephemeral copies were not the product of any volitional act by Defendant and therefore no license fees are due for such copies.

SIXTH DEFENSE

(Unclean Hands)

6. Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands, to the extent that its claims impermissibly seek to use Plaintiff's appointment as the collective for the Business Establishment Service license, and Plaintiff's resulting market power, to extend the rights of the relevant copyright owners beyond those granted by the Copyright Act.

SEVENTH DEFENSE

(Copyright Misuse)

7. Plaintiff's claims are barred in whole or in part by the doctrine of copyright misuse, to the extent that its claims impermissibly seek to use Plaintiff's appointment as the collective, and Plaintiff's resulting market power, to extend the rights of the relevant copyright owners beyond those granted by the Copyright Act.

EIGHTH DEFENSE

(No Fixation)

8. Plaintiff's claims are barred in whole or in part because the alleged ephemeral copies were not sufficiently fixed to constitute actionable copyright infringement and therefore no license fees are due for such copies.

NINTH DEFENSE

(No Attorneys' Fees Available)

9. Plaintiff's claims for attorneys' fees and costs are barred, in whole or in part, because the section of the Copyright Act upon which Plaintiff attempts to rely only applies to claims for infringement and does not apply to the claims in this case. In the alternative, even if that provision did apply to the claims in this case, Plaintiff cannot meet its burden for entitlement to an award of costs and fees.

TENTH DEFENSE

(Waiver)

10. Defendant has waived claims relating to reporting periods prior to 2014 on the ground that it failed to conduct timely verifications for those periods pursuant to the applicable regulations.

ELEVENTH DEFENSE

(Reservation of Additional Defenses)

11. Defendant presently has insufficient knowledge and/or information on which to form a belief as to whether it may have additional, as of yet unstated, affirmative defenses available. Defendant reserves the right to assert additional defenses if discovery indicates they would be appropriate.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Defendant demands trial by jury in this action of all issues so triable, whether at law or in equity.

RELIEF REQUESTED

WHEREFORE, Defendant respectfully prays for judgment as follows:

1. That Plaintiff's complaint and all claims and causes of action therein be dismissed with prejudice;
2. That Plaintiff take nothing by reason of its Complaint;
3. That judgment be entered against Plaintiff and in favor of Defendant;
4. That Defendant be awarded its costs and attorneys' fees in this action to the extent permitted by law; and
5. For any and all such further relief as the Court may determine is just and proper.

Dated: June 24, 2019

Respectfully Submitted,

/s/ Paul Fakler

Paul Fakler (District of D.C. Bar No. NY297)

ORRICK, HERRINGTON &

SUTCLIFFE LLP

51 West 52nd Street

New York, NY 10019

(212) 506-5000

pfakler@orrick.com

Diana Szego Fassbender (D.C. Bar No. 996625)

1152 15th Street, N.W.

Washington, D.C. 20005-1706

(202) 339-8533

dszego@orrick.com

Proof of Delivery

I hereby certify that on Wednesday, February 23, 2022, I provided a true and correct copy of the Music Choice's Response in Opposition to SoundExchange's Motion to Reopen Business Establishment Service Rate Proceedings to the following:

Sirius XM Radio, Inc., represented by Todd Larson, served via USMAIL

Muzak LLC, represented by Gary R Greenstein, served via ESERVICE at
ggreenstein@wsgr.com

DMX, Inc., represented by Gary R Greenstein, served via ESERVICE at
ggreenstein@wsgr.com

Pandora Media, Inc., represented by Milton E. Olin, Jr., served via USMAIL

Clear Channel Communications, Inc., represented by Bruce Joseph, served via USMAIL

Music Reports, Inc., represented by William Colitre, served via USMAIL

SoundExchange, Inc., represented by C. Colin Rushing, Esq., served via USMAIL

Signed: /s/ Paul Fakler